EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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METROPOLITAN TRANSPORTATION AUTHORITY, et al.,

Plaintiffs,

v. 25 Civ. 1413 (LJL)

SEAN DUFFY, et al.,

Defendants.

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New York, N.Y.
May 27, 2025
10: a.m.

Before:

HON. LEWIS J. LIMAN,

District Judge

APPEARANCES

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(Case called)

THE DEPUTY CLERK: Starting with counsel for plaintiffs, please state your appearances for the record.

MS. KAPLAN: Good morning, your Honor. Robbie Kaplan from Kaplan Martin, here for the plaintiffs, and I am here with my colleagues, my partner Brandon Trice and my colleague Max Crema.

THE COURT: Good morning.

MR. CHERTOK: Mark Chertok from Sive, Paget & Riesel for MTA/TBTA, along with my partner Elizabeth Knauer.

MR. FRANK: Andrew Frank from the State Attorney General's office on behalf of the State Department of Transportation.

MR. TAYLOR: Nathan Taylor with the New York City Law Department on behalf of the City Department of Transportation.

MR. LADIN: Dror Ladin for intervenors Riders' Alliance and Sierra Club.

MR. ROBERTS: Charles Roberts from the U.S. Department of Justice on behalf of defendants.

MR. BRUNS: Good morning, your Honor. Michael Bruns, United States Department of Justice, on behalf of defendants.

THE COURT: Is there anybody here from the U.S. Attorney's office for the Southern District of New York? Or no.

MR. ROBERTS: No, your Honor.

THE COURT: Give me one moment.

We are here for oral argument on the motion by plaintiffs for preliminary injunction. I have allocated 45 minutes to each side. The plaintiffs, as the moving party, go first.

Ms. Kaplan, have you decided how you are going to allocate your time and whether you are reserving time for rebuttal?

MS. KAPLAN: We have, your Honor. I'm going to do 30 minutes to begin, only me, and then would like to reserve 15 minutes for rebuttal, and Mr. Frank reserves some time to speak at rebuttal, if necessary.

MR. FRANK: Yes.

THE COURT: Mr. Frank.

MR. FRANK: If I might address that briefly?

We are not arguing initially, we intend to stay on our papers. There are some issues the defendants have not addressed so we believe that those issues are unrebutted and so we will rest on our papers. To the extent that there are issues that both MTA and we have raised, we are willing to rest on our papers, as well as the arguments that Ms. Kaplan will make. Of course I am here to answer any questions, if the Court wishes.

THE COURT: Thank you very much.

Ms. Kaplan, we will hear from you. Do you want a

warning sign as you approach the half hour mark?

MS. KAPLAN: I would love that, your Honor.

THE COURT: At what point?

MS. KAPLAN: Good question. 20-25.

THE COURT: After you have exhausted 20 minutes?

MS. KAPLAN: Yes; and 25.

THE COURT: OK.

MS. KAPLAN: Good morning again, your Honor.

As your Honor knows, we commenced this action on February 19, immediately after Department of Transportation Secretary Duffy announced that he was rescinding approval for congestion pricing under the Value Pricing Pilot Program -- or VPPP statute -- and terminating the VPPP agreement because of his view that congestion pricing is not authorized under the VPPP statute. At that time, your Honor, we quite deliberately did not seek emergency injunctive relief. As we said from day one, we believe that the secretary's conclusion that the VPPP does not authorize congestion pricing is incorrect as a matter of law so that the purported termination is invalid. As a result, as everyone knows, congestion pricing has remained in place. And since nothing has changed since February, there is no reason that the judicial process couldn't play out in the ordinary course, as your Honor will recall, the parties were originally talking about when we were talking about the scheduling in the case.

We were always sensitive to the question of timing and we kept raising it with defendants. We didn't want to find ourselves in a situation where the defendants had acted precipitously and took action before the legal issues here could properly be presented to and decided by your Honor. Things have now changed.

After months of threatening to take action if congestion pricing does not end, on April 21, Secretary Duffy issued an order to show cause letter stating that he "will implement" various "compliance measures" as early as May 28 -- which your Honor knows is tomorrow -- unless congestion pricing is stopped by May 21 -- and as we all know it didn't.

After that letter, your Honor, we promptly tried to meet and confer with defendants regarding a briefing schedule and right after that we filed this motion for preliminary injunction.

The clear purpose of the April 21 letter and the compliance measures that are threatened there is to present my clients with a Hobson's choice, either to end congestion pricing and lose its environmental and financial benefits, not to mention the half billion dollars we invested in it and the bonds that we have issued already that are needed to improve and repair the outdated subway infrastructure, or face wide-scale withholding of funds and approvals for transportation projects including, but not limited to, projects

here in New York City.

THE COURT: So, Ms. Kaplan, I understand your argument that the Court doesn't have to wait for Damocles' sword to fall before entering an injunction. The nature of an injunction is to prevent the sword from falling. Most of the harm that you have identified seems to relate to what would happen if the compliance measures are ordered or if New York stops congestion pricing. Have you identified any harm to me that your clients have suffered or that co-plaintiffs have suffered right now as a result of the threats?

MS. KAPLAN: Yes, we have, your Honor.

As I just mentioned, the MTA issued bonds in connection with congestion pricing. Those bonds are long-term. They rely upon the revenue stream that will be coming in in the future from congestion pricing. And, as your Honor knows, that kind of uncertainty in the bond market and financial market is already impairing and injuring the MTA.

I should note that our CFO, Kevin Willens is here in the courtroom if your Honor has any questions, but that is the key issue that is already hurting us right now.

THE COURT: Are those the 30-year bonds or are they shorter term?

MS. KAPLAN: I believe they're 30 years but my colleagues just nodded yes, they're 30 years -- no. One colleague said yes, one colleague said no. I will get you the

answer, your Honor.

THE COURT: OK.

MS. KAPLAN: So, given this kind of unique circumstance we are in, we are seeking a preliminary injunction really to preserve the status quo and to allow your Honor to decide whether defendants' efforts to stop congestion pricing are proper.

So, what is defendant's response to this? They have said two things. Their argument is that we are both somehow too early and too late. Too early, they argue, because the administration hasn't actually decided exactly which of the various retaliatory actions they will take in order to punish us for defying President Trump's post on social media on February 19, where he presents a picture of himself wearing a crown and says, in all caps: Congestion pricing is dead. Long live the king. And too late, according to defendants, your Honor, because we should have sought our preliminary injunction earlier. But as I just explained, we asked defendants when and if they were going to do anything. And as your Honor will recall, at the conference on April 9, your Honor asked defendants to confirm that there was no action that was imminent to be expected from the federal government. Counsel for defendants confirmed that Secretary Duffy was still evaluating options. The one thing we do today know for sure, your Honor, is that as of tomorrow they have said they can and

will start taking any of the measures listed in their April 21 letter, which isn't even limited to things that are listed there.

THE COURT: Are you also asking, in the alternative, for a TRO so I can consider the arguments today?

MS. KAPLAN: Yes, your Honor. If your Honor needs more time to consider the arguments, absolutely a TRO would be the appropriate remedy.

So, as we have been saying all along, we believe that the Court should act, either by TRO or by preliminary injunction, so as to avoid the parties and the Court having to scramble at the last minute to try to stop or undo the damage. Let me start with finality.

The doctrine of finality asks your Honor whether an agency's decision-making process has concluded and whether there will be legal consequences as a result. That standard is satisfied here. On February 19, Secretary Duffy said, "I am rescinding FHWA's approval of the program under the November 21 VPPP agreement, and I am terminating the agreement." Secretary Duffy's April 21 letter is just as final. It says that the FHWA will implement certain compliance measures and goes on to list the possible measures that they can implement.

The fact that the April 21 letter invites my clients to come up with some way of changing the secretary's mind doesn't really mean that the issue is still open. It is

important in this respect, your Honor, to note that this is a legal issue, or what defendants now call a policy issue, not really a factual issue. And the parties, having discussing these issues --

THE COURT: They now call it a policy issue.

MS. KAPLAN: Exactly, your Honor.

And the parties have been discussing these issues now for months. As has been wildly reported in the press, there were meetings between the governor and the president, there meeting with officials, etc. So, it is completely implausible at this point to think that there is anything we can do or say that would change the Trump Administration's mind. Justice Scalia's opinion from a unanimous Supreme Court in the *Sackett* case is directly on point. We relied on that case in our briefs, defendants didn't address it in their opposition.

In *Sackett*, landowners, I believe in Idaho, challenge an EPA order finding they violated the Clean Water Act and directing them to restore their property. Justice Scalia concluded that the EPA order was a final agency action because the text of the order made it clear that EPA's deliberation was at an end.

Sackett establishes three important things, your Honor. One, when an agency issues an order that is on its face final as to determination of the law, that is a final agency action. Clearly the February 19 letter was that, your Honor.

Two, an agency does not need to try to enforce the order before it is final. And three, once an agency has rendered a decision, the mere possibility -- those are Justice Scalia's words -- that the agency might reconsider, doesn't really matter for purposes of finality.

Defendants respond by saying that the February 19 termination letter is part of a larger, again these are their words, quote, larger unfolding administrative process but the only process that remains here is for them to choose which means of enforcement they had to take. And they haven't invited my clients to weigh in on that. Plus *Sackett* says that alone is not enough. Moreover, your Honor, to the extent that there is any such larger unfolding process, then we shouldn't have heard about it for the first time in their opposition papers. And such process, including whatever it entails, should have been disclosed originally in the February 19 letter under black letter principles of the APA.

Defendants argue that the April 21 letter gave us a chance to contest the termination but I would implore your Honor to take a look at the April 21 letter. I don't think you will find the words "re-open" or "reconsider" anywhere in that letter. And defendants have repeatedly stated since then that the February 19 termination stands. In fact, they've said so to the Daily News as recently as May 21, reiterating again that they can start taking compliance measures tomorrow.

Moreover, your Honor, as we already know from the prior cases that you have been handling, the VPPP operates as an exception to the original statutory prohibition on tolls on federal highways in Section 301. Defendants have repeatedly said because they terminated the VPPP here, the program is prohibited under Section 301 and have ordered us to cease tolling. But, as *Sackett* makes clear, the mere possibility that an agency may reconsider in light of informal discussion is not enough.

THE COURT: Is there really any question that if the VPPP agreement was in fact terminated then the operation of congestion pricing would be in violation of Section 301, in other words, that your clients needed the cooperative agreement in order to go forward?

MS. KAPLAN: No. No, we don't dispute that at all, your Honor.

And the other thing I think is quite clear from these circumstances, your Honor, and I think the *Loper* decision decided by the Supreme Court last term is very important, is that the question you just asked me, interpreting the meaning of 301, interpreting how the various federal statutes with respect to tolling operate, determining whether the VPPP agreement, which they signed, is authorized or not, those are decisions for your Honor. Secretary Duffy, thanks to *Loper*, no longer has the right to change his interpretation of a statute

and have that be binding upon anyone. It is a decision for the Court. If they say it once in *Loper*, Chief Justice Roberts, he says it 752 times.

THE COURT: You really counted the numbers?

MS. KAPLAN: No, that's an exaggeration, your Honor. I'm sorry. Sometimes I can't help but embellish a bit.

Defendants also fault us for not seeking injunctive relief immediately after February 19 but, as I said before, we filed the lawsuit immediately after February 19, and we didn't seek injunctive relief for the reasons I already explained. Any delay between the April 21 letter and the day we filed this motion on May 5 is attributable solely to our efforts to try to work out a briefing schedule with defendants.

THE COURT: Let me ask you on that subject, has the administrative record been produced yet?

MS. KAPLAN: No. Today. They're getting it today.

THE COURT: Today is the deadline.

MS. KAPLAN: Today is the deadline. There was correspondence about it over the weekend, your Honor, and what we suggested that the government should do for purposes of efficiency, is not have to file with the Court anything that was previously part of the administrative record in Mulgrew and those cases but anything new to file. I'm not sure, but I think they're agreeable to that.

THE COURT: I would have been prepared, had the

administrative record been produced earlier and all discovery with respect to it addressed, to move more quickly as the parties suggested, to summary judgment.

MS. KAPLAN: We will absolutely undertake all efforts to do that, your Honor.

Let me turn to rightness, another one of the key arguments that defendants made. As your Honor knows, the concept or doctrine of prudential rightness is a discretionary doctrine that forms a "narrow exception to this Court's jurisdiction." To determine whether it applies courts ask, one, whether the issues are fit for judicial decision; and two, whether a party is likely to suffer hardship if the Court withholds consideration.

For all the reasons we have already said, your Honor, both factors weigh very heavily in our favor here. Again, this is a legal challenge, precisely the kind of disputes that courts are supposed to handle under *Loper*; and two, the February 19 letter focused on whether the program is authorized under that statute, under the VPPP statute. And while defendants, as your Honor has noted, are now repackaging many of their statutory arguments as policy arguments, the permissibility of those rationales presents a legal question for the Court.

In terms of hardship, your Honor, there is really no question we are already suffering hardship as a result of the

bond issues that I discussed and there can't really be any dispute that if it takes some measure tomorrow, we will have immediate irreparable injury.

THE COURT: Let me ask you a question.

MS. KAPLAN: Sure.

THE COURT: Assume that I agree with you that the secretary did not have the authority to revoke the VPPP agreement. Would there be any need for me to address what to them seemed to be a hypothetical question as to whether the secretary could employ any of the threatened compliance measures if I had determined that the MTA and the other plaintiffs were in violation?

MS. KAPLAN: That is what we asked for, as your Honor knows, in our compliant. That is precisely the declaration that we seek. I don't think the secretary could. I think any such compliance measures, particularly those listed in the April 21 letter would be unlawful if they attempted to do that, but that is why we sought the relief of declaratory judgment. I have also been thinking --

THE COURT: But do I need to address that? It may be that I do need to address that if I agree with the defendants that the secretary had the authority to revoke the VPPP agreement or that the prior administration didn't have the authority to sign it. But, assume that I agree with you that the prior administration had the authority and the secretary

doesn't have the authority to revoke it, why would I then go on to decide questions about what would happen in the event that the present secretary, the new secretary, the one who is the defendant here, has that authority?

MS. KAPLAN: I don't think your Honor does need to decide and I would assume and expect that Secretary Duffy will comply with your Honor's order declaring that the cancellation of the VPPP agreement was improper and illegal.

I have been thinking, your Honor, because I thought you had raised these issues about what kind of compliance measures would be OK, assuming that the VPPP agreement stays in place and I came up with a couple of ideas.

One, and you have to really look at the VPPP agreement, this very clearly sets this forth, one, there is a schedule for the tolls, that is attachment A to the VPPP agreement. So, if, for example, the MTA were to decide tomorrow -- which are they're not, to be clear, I don't want anyone to freak out here -- decide tomorrow that they're going to increase the tolls from $9 to $15, that would be a violation of the VPPP agreement and they could take measures. And then on a somewhat lighter note, your Honor, if --

THE COURT: I assume if they reduced the tolls that might also be a violation.

MS. KAPLAN: Exactly right. Or if, for example, as was the issue in the other case, if the MTA were to charge

different tolls to the New Jersey crossings than it would for people coming from New York, that would also be a clear, blatant violation of the VPPP agreement and compliance measures could be taken.

Turning to the Tucker Act, your Honor, I think it is pretty easy, actually. The Tucker Act doesn't apply here because the VPPP agreement is an unfunded cooperative agreement. We cite cases that say that the Tucker Act doesn't apply because these are not money mandating contracts. That's the language from the *Bernard Parish* case. And, the Tucker Act also doesn't apply when there is no jurisdiction in the Court of Federal Claims and there is no jurisdiction in the Court of Federal Claims if it is not a contract based on money.

THE COURT: But the mere fact that it is a cooperative agreement does not necessarily divest the court of claims of jurisdiction; right? The court of claims has made that clear.

MS. KAPLAN: Correct, your Honor. The court of claims make that clear but here the dispute is not about the contract. Here the dispute is about whether they have the authority to revoke congestion pricing today, and that's an issue that arises under the APA, NEPA, and the Constitution, not under provisions of this contract.

And I will note that we site the *Megapulse* case, your Honor, from the D.C. Circuit, 1982, in which the Court says when the source of rights asserted is constitutional,

statutory, or regulatory in nature, the fact that resolution of the claim requires some reference to a contract does not magically transform the action into one on the contract and deprive this Court of jurisdiction.

The Christian doctrine is similar, your Honor. That doesn't apply either. The reason it doesn't apply is because that applies to procurement contracts and this is not a procurement contract. As your Honor knows, we don't get a penny under the VPPP agreement so there is no way the Christian doctrine could apply.

THE COURT: In fact, I think the only obligation of the FHWA, under the agreement, is to cooperate with your clients. There is no other affirmative obligation they have whatsoever.

MS. KAPLAN: Correct, your Honor.

I now want to turn to the merits or likelihood of success and I will note on that that I think it is telling that defendants don't make any effort to even discuss the merits until page 35 of their brief.

THE COURT: Let me ask you, let's assume that I agree with the position that seems to have been taken by the secretary that the prior administration didn't have the authority to sign the VPPP agreement, Congress didn't give the authority. Then I wouldn't need to go beyond that, right, to consider whether the decision was otherwise arbitrary and

capricious? You said that is a legal determination for me.

MS. KAPLAN: Correct.

So if, for example, going back to the February 19 letter, if as the secretary originally argued, the VPPP statute does not authorize what he calls cordoned pricing, congestion pricing where there is no alternative route into the area, then that would be a legal question for your Honor to make and I don't think you have to decide arbitrary and capricious; that would be correct. That is really why the whole point about this being open because we are going to talk further with the defendants doesn't make sense here.

So, the first concern they now make, which was originally a statutory issue and now they call it a policy issue is this toll-free option I just talked about. But there is nothing unusual about drivers having to pay a toll to access a certain geographic area. We New Yorkers are very familiar with that. All the ways to get onto Staten Island are tolled and have been tolled for decades. Moreover, defendants ignore the real substantial amount of evidence we cited in our complaints that the FHWA and Congress have, for years, encouraged cordoned pricing options without a toll-free option because they are honestly the most effective ways to reduce congestion. And on top of that, your Honor, as your Honor knows, the very idea of congestion pricing began here in New York at Columbia University, and the concept had to do with

Manhattan, lower Manhattan in particular, which is a pretty narrow strip of land; the idea that there would be some alternative non-toll-free way wouldn't really work.

The second argument that defendants make is that the program imposes a disproportionate financial burden on low and medium income drivers. This is contradicted by the FHWA own conclusions in the NEPA analysis that the Court has already been looking at. There they found that the program would actually benefit those populations, including by facilitating mass transit and reducing congestion on the roads and including the discount that is offered for frequent low-income drivers into the CPD. I will note, they make an argument about the Bronx, your Honor, and this really goes to irreparable injury, and they say they're worried about congestion increasing in the Bronx, they cite an early article suggesting that that might happen. It turns out that it hasn't happened.

THE COURT: By the way, you have got 8 minutes to go.

MS. KAPLAN: OK, your Honor.

They talk about, the next argument they make is that congestion pricing is a tax but that argument was decided by Judge Seibel already. And they say that you can't use it to support mass transit but, obviously, that was the whole point of the VPPP agreement.

MR. CHERTOK: Let me turn to termination of authority, your Honor. The VPPP agreement, as your knows, says nothing

about termination. And to the extent it speaks to longevity it says, which is consistent with the statute, that the private sponsor shall monitor the program for at least 10 years. The defendant's argument now is that they have the authority to terminate the program under the regulation 2 CFR 200.340(a)(4), but that doesn't work because that regulation says the agency may only terminate a federal award "pursuant to the terms and conditions of the federal award." And the accompanying regulation says that when a federal agency wants to have a right to terminate, they must "clearly and unambiguously specify all termination provisions in the terms and the conditions of the award."

This pretty much forecloses the argument they based on the regulation.

So, in order to continue making this argument they go on to say that the VPPP agreement somehow silently incorporates regulations that talk about all federal law and that is how it gives them a right to terminate. But the provisions they cite to, such as that our clients agree to comply with all federal laws, don't say anything about incorporation and they don't say anything about incorporating any right to terminate. Similarly, another regulation they cite, which says that you must inform recipients of the termination provisions including the applicable termination provisions in a clear and unambiguous way, also obviously doesn't give them a right to

terminate because if they followed that, there would be a termination provision in the VPPP agreement itself.

It is important, your Honor, to note the defendants don't just argue based on these arguments that they have a unilateral right to terminate the VPPP agreement. The underlying logic of their argument is that every single agreement that a federal agency enters into, by implication, has a unilateral right to terminate that agreement regardless of what the agreement says or what the agreement is for. That shows how far they have to stretch to make this incorporation by reference argument, your Honor. And having read *Loper* and gotten the number wrong on how many times Chief Justice Roberts talks about it being decision for the Court having read *Loper*, that would be completely inconsistent with the reasoning in *Loper*.

Reliance and trust, your Honor, we have already touched on. I would only site that the *Regents* case which makes it clear that even if the agency was correct about the law, they still have to consider reliance and they have clearly no consideration of reliance in here. The February 19 letter kind of brushes it aside. They talk about that we shouldn't have relied because we knew that Donald Trump could have become president again but this ignores all the years that followed the last presidential campaign and the fact that we relied on it, the fact that the prior Trump administration said that

congestion pricing would be the perfect fit for the issues that we have here, and I would argue that under *Loper* and *Regents*, the idea that an agency can't rely on federal statements because there may be a new administration in the future would --

THE COURT: Your argument is that the recipient and the sub-recipient are not required to accept, at face, the statements of a candidate on the stump and then to also assume that that candidate on the stump (A) will become president; and (B) when becomes president, his secretaries will carry out those views.

MS. KAPLAN: You just said it so much better than I did, your Honor. I completely agree with that.

There is language in *Loper* about instability in the law if these kind of things could change from administration to administration, and obviously if we are talking about a kind of public works transportation project, like we are talking about here, that would be even more concerning.

Finally, your Honor, because I don't think I have much time left, I'm going to turn to --

THE COURT: I will give you five more minutes.

MS. KAPLAN: I will turn to balance of the equities and the public interest. When the government is involved, those two inquiries kind of combine and here they, we believe, strongly favor granting our motion.

First of all, obviously we cite the *League of Women Voters* case for this. There is no public interest in the perpetuation of an unlawful agency action and we believe that Secretary Duffy's action to terminate the VPPP agreement was unlawful.

There is no --

THE COURT: On the bounds of hardship, so I get your point that the state suffers harm when the policies adopted by its elected representatives are not permitted to go forward, but doesn't the federal government also suffer harm when, on a preliminary basis, before the Court has reached a final determination, the policies of the democratically elected president are enjoined?

MS. KAPLAN: I agree with that, your Honor, and I agree with, as your Honor said at the beginning of this argument, the need, the proper way to decide this would be on summary judgment as we originally discussed at the beginning of the case but it is the defendants who are creating the problem here. We asked them, if your Honor will recall, in letter after letter, to agree to maintain the status quo so your Honor could properly decide the issues and then we would all have decisions, and they've refused. They've even refused to not give up the deadline of tomorrow for them putting in place compliance measures that would create irreparable harm to New Yorkers throughout the city and throughout the state.

So, there is a way to solve that problem. They just need to -- we are happy to accelerate even the summary judgment briefing but they need to agree to maintain the status quo in the meantime. And if they won't, and they haven't, that's why we are in this court asking your Honor to do something which, I agree, your Honor shouldn't need to have to do.

I don't think, unless my colleagues tell me I missed anything, I have anything else to say, your Honor, but I'm going to reserve 15 for rebuttal.

THE COURT: You actually have 16 minutes for rebuttal because you used your time efficiently.

MS. KAPLAN: Thank you, your Honor.

THE COURT: I will hear from the defendants. You have got 45 minutes.

MR. ROBERTS: Good morning, your Honor. Charles Roberts from the U.S. Department of Justice on behalf of defendants.

Plaintiffs bring this case and this motion at the wrong time and in the wrong place. Either the claims are about whether the Federal Highway Administration's ongoing agency process --

THE COURT: Let me ask you, just as a preliminary matter, is what Ms. Kaplan said, what plaintiffs said correct, that you are not willing to commit, on behalf of your client, to hold off on compliance measures until I decide the summary

judgment motions?

MR. ROBERTS: My clients are willing to say that any determination of non-compliance under 301 would provide a reasonable amount of time before any compliance measures --

THE COURT: No, no. My question to you is, is your client willing, right now, to agree to me entering an order that says -- let's start small -- that for the next 14 days, your client will not take any measures to force the plaintiffs to stop congestion pricing whatsoever. Is your client willing to agree to a court order to that effect and to comply with that order?

MR. ROBERTS: We would, of course, comply with this Court's orders. I would have to check with my client about those particular terms that your Honor just laid out, but what I am able to say is any determination of non-compliance would provide for a reasonable amount of time before compliance measures would go into effect in order to help facilitate timely judicial review of that determination of non-compliance. So, we are saying there is going to be a gap between such a determination and the imposition or effectiveness of any compliance measures. I just don't know, in response to your specific question, whether 14 days is sort of the number that we are talking about there.

THE COURT: Is it still your client's position that the prior administration did not have the lawful authority to

sign the VPPP agreement?

MR. ROBERTS: Yes, your Honor.

As laid out in our brief, we believe that the two issues, which plaintiffs recognize as policy concerns, informed the February letter, informed the April letter. Those are an independent and adequate ground to affirm the agency's decision here under the APA, and so we don't think your Honor needs to reach --

THE COURT: Adequate and independent is a standard that the Supreme Court uses when it reviews a state court decision to determine whether it rests upon adequate and independent state grounds. Is there any authority that that doctrine applies to the APA to permit the Court to sustain administrative action that is taken on one ground but then defend it in litigation on another ground? Do you have a case that would support that?

MR. ROBERTS: I dispute the characterization --

THE COURT: You used the language adequate and independent.

MR. ROBERTS: No, no. I am not disputing that, your Honor, and that is correct that is the language that the Supreme Court uses. What I meant to dispute was the end of your Honor's characterization that these concerns only arose in litigation. They're on the face of the April letter which is part of the administrative record here and they are on the face

of the February letter, as well. Those policy concerns prompted the secretary's consideration and they are part of that decision from the get-go here. I don't think anyone is uncertain that those policy concerns were part of this decision from the get-go.

THE COURT: How long is your client willing, if I were to enter an order that says for "X" number of days your client will not take any compliance measures, what is the "X" that your client agrees to?

MR. ROBERTS: I don't have an X number that we are willing to affirmatively offer. Of course we will comply with X number of days in your Honor's order, as you describe it.

Going back to independent and adequate, that is the language the courts use in interpreting the prejudicial error rule that is on the face of the Administrative Procedure Act. 706 incorporates the rule of prejudicial error, courts must take account of it, that is the harmless error standard, so a decision is not arbitrary and capricious to the extent that it rests on any valid independent grounds. And there are many cases that I am willing to provide in supplemental briefing, if your Honor needs it, but if you look at cases discussing prejudicial error under 5 U.S.C. 706, that is where you will find that independent and adequate sort of language.

So, there are claims by the Federal Highway Administration's ongoing agency process that may continue, in

which case there is no jurisdiction to review that non-final and unread agency action, or their claims are about whether the terms of their contract with the government permitted termination, in which case Congress has provided exclusive jurisdiction in the Court of Federal Claims. I heard plaintiffs to say both that their claims here today all hinge on the agreement. Whether or not they're in compliance under 301 all hinges on the agreement in interpreting the agreement here.

THE COURT: What provision of the VPPP agreement do you say that the plaintiffs are resting their claim on? I have the agreement in front of me so tell me which paragraph.

MR. ROBERTS: That they're resting their claim on? They're resting their claim on the absence of an explicit termination provision within the four corners of the agreement is my understanding, so to the extent they need your Honor to interpret that agreement and to determine whether or not it authorized termination? There is no way to get to the question of whether or not that agreement is in effect without going through the agreement and the question of whether it authorized termination.

THE COURT: So they're relying, you say, not on anything that is in the agreement but on something that is not in the agreement. That's kind of an odd contract claim, isn't it, to sue somebody for violating a provision that doesn't

exist?

MR. ROBERTS: No, your Honor. The question is whether or not this agreement, as entered into by the parties, contemplated termination and they say that it did not, it does not authorize us to terminate it. They're not saying that the VPPP statute or any regulation prohibits us from terminating the agreement, they're saying this agreement does not allow us to terminate this agreement. There is no way around that question of what this agreement means in order to reach the question of whether it was validly terminated. That is the question. That is the contractual question before the Court. That is the source and nature of plaintiff's asserted rights here.

THE COURT: Is there anything else other than the absence of language in the VPPP agreement that you say the plaintiffs are resting their claim on in terms of the VPPP agreement?

MR. ROBERTS: I also heard them to be resting on the selective quotation of Section 8(b) of the agreement which says that they will monitor the parties, TBTA and NYCDOT shall monitor and report on the project performance from the date of implementation for a period of at least 10 years or to the end of the life of the project, whichever is sooner. That part, whichever is sooner, or the end of the life of the program or whichever is sooner, that gets left off of plaintiff's

discussion of the 10-year term, the minimum 10-year term that they seem to argue is contemplated by this agreement. That is one specific piece of language in here that I think that they're also relying on. To the extent they're saying we at least -- that the defendants at least do not have authority to terminate the agreement for 10 years, they're relying on that particular language and selectively quoting it in order to say that it is a minimum of 10 years when that is clearly not what the full phrase says.

But yes, I think, your Honor, to the extent that they are arguing that we are not allowed to terminate the agreement, there is no way to reach to conclusion on that question without interpreting the agreement. Yes, there is reference to regulations, yes, there is reference to statutes, but plaintiffs own case which they brought up today, *Megapulse*, I believe we cited it as well, but *Megapulse* --

THE COURT: Isn't it actually your client who is seeking to revoke the agreement? They're quite comfortable with the status quo. The status quo is that they have an agreement signed by the federal government that permits them to do what they have been doing so they're fine with the status quo. It is your client who wants to change the status quo, as I understand it.

MR. ROBERTS: That is the process that is under way --

THE COURT: No, the process has concluded, right, in

terms of your client has taken the position, you have taken the position here today, right now, that the federal government didn't have the authority to sign the VPPP agreement.

MR. ROBERTS: Yes, but to the extent your Honor disagrees with that, we had other reasons to terminate the agreement and those are the reasons that we have discussed and are resting on here today. But the source and nature of rights that they assert are contractual. There is no way around it. The VPPP statute, and they point to no provision in the VPPP statute and no provision of the regulations, that specifically entitle them to authority to run the CBTP. That only comes through this agreement. And so, interpreting this agreement is absolutely necessary to determine their claims, that is the source of their rights, asserted rights, and as your Honor just suggested --

THE COURT: I confess, I am still confused because I don't understand it to be your argument that the contract has a termination provision. Their argument is we have an agreement. It is an agreement. The government has breached it, is threatening to breach it. Isn't that the state of play?

MR. ROBERTS: There is a contractual dispute, I'm not sure how else to better characterize a contractual dispute, is that plaintiffs believe we have improperly breached by saying it is terminating.

THE COURT: You are just saying this thing was not

without authority. That is something that courts, federal courts determine every day under the APA, whether administrative action was permitted by law and arbitrary and capricious.

MR. ROBERTS: Your Honor could say that about any contractual claim and *Megapulse* makes clear that that sort of broad rule that any government contract, because it stems from statutory or regulatory or constitutional authority, any government contract claim could be reframed in that way and thereby destroy the jurisdiction of the Court of Federal Claims.

THE COURT: What is your response to the fact that this is, both by statute and under the terms of this, a cooperative agreement?

MR. ROBERTS: The question --

THE COURT: That is what Congress calls it, a cooperative agreement. The federal government hasn't put in any money, they're not seeking any money. It is not a money demanding agreement, it is a cooperative agreement.

MR. ROBERTS: What they are seeking is a contractual remedy which is specific performance. They're asking us to continue to perform on the contract here by continuing to authorize the CBTP, so that is the remedy --

THE COURT: Which provision do you say again? We are going round and round. Let me hear your next argument.

MR. ROBERTS: Well, that is, the type of relief argument is also a separate reason for considering this as a government contract under the Tucker Act. The cooperative label is not dispositive. The fact that they are seeking us to perform on the contract is the fundamental point there and the government has not waived sovereign immunity as to specific performance of contracts. That's the whole point of the Tucker Act, is if we have an agreement, a contract between the parties that is susceptible, potentially, to money damages, that is the appropriate remedy. Whether or not they choose to plead it that way in order to avoid the Court of Federal Claims jurisdiction is not the question. The question is what is the nature of the relief that they're seeking. The nature of the relief that they're seeking is as your Honor put it, to enforce this contract, to keep it in place.

THE COURT: I didn't say that, or if I said that I misspoke. I don't think that they are pointing to any provision of the contract and saying you, the federal government, have to do anything. They're saying that you cannot say that they have violated Section 301 because you have agreed that they're not violating Section 301. It may be a different person, you know, we substitute secretaries all the time in terms of under the federal rules, but it is still the secretary of transportation has agreed.

MR. ROBERTS: Right.

THE COURT: The secretary of transportation has agreed that this program is permissible. Now there is a legal question for me as to whether the secretary of transportation had that authority to agree to the VPPP agreement but that's a question that doesn't turn upon the contract, it turns upon the question of whether the secretary had the authority to sign the VPPP agreement.

MR. ROBERTS: That is one of the questions but the other question still remains is whether we validly terminated this agreement. And by terminating the agreement we would -- we would withdraw Section 1 of the agreement which provides the authorization for them to conduct the CBTP. That's what plaintiffs want here. They want Section 12 as a value pricing project as part of NYC DOT's value pricing pilot program, that's what they want to be in force, that is what they're asking for an order from your Honor saying, is this agreement that approves, authorizes you to operate the CBTP without violating 301, that's what they're asking your Honor to put in place and that is specific performance on this agreement. The cooperative label does not determine that but I would point out actually, your Honor, although there is no transfer of funds within the four corners of this agreement, it does authorize the federal transfer of funds. As federal officials such as myself traveling here to this argument and as government vehicles traveling to CBTP, we have to pay the tolls. Unless

one of the applicable exceptions applies they are authorized to collect money from the federal government only by virtue of this agreement. And so there is money at stake here as well. Plaintiffs are very happy to point out --

THE COURT: I could be a little bit lighthearted and ask whether my experience taking the subway in from an airport tends to avoid rush hour traffic, I don't know how you got in this morning.

MR. ROBERTS: I traveled in last night. I lived in New York City for seven years, I have taken all modes of transportation getting in and out of the city.

THE COURT: Did you bike or walk or drive? How did you get here?

MR. ROBERTS: I took Amtrak up, your Honor.

THE COURT: OK.

MR. ROBERTS: So, the point, though, is that there is an explicit authority for them to receive federal funds that they would not receive but for this agreement. So to the extent there needs to be money at stake, to the extent there needs to be a potential for money damages in order to get us over the Court of Federal Claims under the Tucker Act, I think that that easily satisfies it.

So, either way, this is not the appropriate forum and the Court should deny motions for preliminary injunction. We also object to the entrance of a TRO as the late-breaking

motion in court today was brought, just to preserve that objection on the record for the same reasons that we lay out in our papers and in argument today.

If the Court determines otherwise, if the Court determines that it has jurisdiction here, it should reject plaintiff's argument that the agency could never terminate this agreement. That simply cannot be right. Indeed, they concede as much in their reply, is what I understand, and the source for that, the source for that ability to terminate is the OMB regulations that they're now saying they're trying to resist here in argument today. I don't understand where another authority to terminate would come from and they say -- I think they say there must be some authority to terminate for some reason under this agreement. To the extent that authority exists, it has to come from those regulations which are mandatory which must be incorporated --

THE COURT: Tell me what gives the secretary the authority to terminate, which regulation?

MR. ROBERTS: Yes, as we laid them out in our brief, any federal award may be --

THE COURT: Give me a citation, 200.340?

MR. ROBERTS: Yes.

THE COURT: OK. I have got it in front of me.

MR. ROBERTS: Yes. And so to the extent they're conceding that we can terminate it for violating the terms and

conditions, that's (a)(1) of 200.340 but there is no reason to cut off the rest of (a) which leads down to (a)(4) and includes authority to terminate if an award no longer effectuates the program or agency priorities.

THE COURT: You actually just skipped a bunch of words, right? You skipped the: Pursuant to the terms and conditions of the federal award including to the extent authorized by law if an award no longer effectuates the program. That's how it reads.

MR. ROBERTS: Yes, that is how it reads. The effect of that is if the agency determines that it does not effectuate the agency priorities then that authority kicks in.

THE COURT: Under your interpretation, what work does the pursuant to the terms and conditions of the federal award do under (a)(4)?

MR. ROBERTS: I think that the terms and conditions, if they explicitly modify this authority to terminate, if they explicitly waive some aspect of this authority to terminate then that might be what terms and conditions could do. The default, though, is that this authority applies. The specific terms and conditions that are 200.340, the termination authority, must be incorporated under 200.211.

THE COURT: So, under your read, (a)(4) would do exactly the same thing if it read by the federal agency or passed through and to the, if an award no longer effectuates

the program goals or agency priorities, so long as termination is not prohibited by the terms and conditions of the federal award.

MR. ROBERTS: Roughly speaking, your Honor, yes. That is the situation here. I think this provision, that the additional language that your Honor quoted might do work in a different agreement. That's not the agreement that we have before us today. The agreement before us today does not have anything carving out or exempting this termination.

THE COURT: But you would have the, pursuant to the terms and conditions of the federal award, be something like except as provided by the terms and conditions of the federal award so that the default is that the agency can terminate based upon change in agency priorities.

MR. ROBERTS: That's one way it could read. Pursuant to the --

THE COURT: I just want to know your reading.

MR. ROBERTS: My reading is that when we have an agreement that is silent as to termination, when it does not explicitly -- does not explicitly say, it does not -- I should take that back. When we have an agreement that is, does not say you cannot terminate this agreement that does not explicitly foreclose or limit the authority to terminate, then this basic if an award no longer effectuates the program goals or agency priorities, termination authority is the backstop.

That's the default.

THE COURT: What is the meaning of agency priorities, in your mind? Are there limits on what the agency priorities may be?

MR. ROBERTS: They need to be authorized by law. I think under sub 4, as you just quoted, but that anything that is within the agency's ambit it is statutory constitutional authority, regulatory authority, that is how agencies determine their priorities and effectuate.

THE COURT: Let's assume that the agency decides it is no longer a priority to fund highway projects in states that have a low birth rate, we are going to no longer honor agreements, cooperative agreements with states that have low birth rates. Consistent with agency priorities? Is that consistent? Does the agency have the prerogative to choose that priority?

MR. ROBERTS: I'm not aware of an authority tying highway funds to birth rates. I'm not aware of one so I --

THE COURT: But what if the agency decided it is our priority now to fund projects in or permit projects to go forward in locales that are agrarian and not urban?

MR. ROBERTS: I'm not aware of a specific authority to distinguish between locales in that way. I know that some federal highway sort of formulas do take into account the density of population or the types of industries that are in

particular areas, so --

THE COURT: Let's say your client currently has said it is his priority to approve VPPP agreements that fund highway infrastructure. That's how I read the April 21 letter. Let's say an agreement is signed, a new administration comes in and says it is no longer our priority to fund VPPP agreements where the toll revenue goes for highway infrastructure, we are only going to fund them where the funding goes for public transportation and this locale doesn't have public transportation. We realize that you had an agreement with the prior administration, prior president, but the new president doesn't think that highway infrastructure should be a priority. I assume under your argument the new administration can do that.

MR. ROBERTS: Yes. Absolutely. Those are --

THE COURT: So why would any municipality or state ever invest in highway infrastructure if in three years' time a new administration can say, *Whoops. Sorry. Our priorities have changed. We realize people have bought bonds but, you know what? It is no longer our priority to fund highway infrastructure we want to fund public transportation.*

MR. ROBERTS: There is no waiver of this sovereign authority to set agency priorities within constitutional statutory regulatory limits in this agreement. The ability to sort of prioritize between different agency priorities is a

sovereign power that is inherent in the agency's authority to set those priorities. There is no basis.

THE COURT: I don't think anybody is quibbling with that. The quibble is whether the agency has to reserve that authority at the time of contracting so everybody knows the terms at the beginning or whether there is going to be a rule of law in this country where people launch public works projects only to have them pulled out from under their feet whenever a new administration or new secretary comes into office.

MR. ROBERTS: No, I don't think that is the question. The question here is first of all whether the agreement contains this authority, we maintain that it does. To the extent that your Honor disagrees that the terms and conditions and these regulations do not explicitly provide that termination authority, then the background Christian principle provides that authority, it must be read in that we have the authority to terminate. To the extent you disagree with that, then the *Winstar* case that we cite stands for the proposition that we cannot waive that sovereign authority to adjust and change agency priorities unless we do so very explicitly and there is nothing coming close to that here.

So that's the order that we go through in order to figure out that termination authority and the question is whether we had that authority. The question whether we should

have exercised it, whether as a policy matter we should or should not have exercised it, that is a question for the agency and perhaps for the parties if they want to have further negotiations and back and forth and engagement on the question of the agreement but not one for resolution that is susceptible to resolution in court.

Those changed agency priorities have been the agency's point from the outset and as I just said, it is the agency's prerogative, not plaintiffs, to set and implement those priorities. Those changed priorities also should not have come as a surprise to anyone. The president campaigned and won on a platform that included choosing not to prioritize programs like this one. Plaintiffs entered into that agreement not while he was a candidate, not while he was on the stump -- after he was elected, in a rush. Now the agency has begun taking steps to fulfill that promise. Plaintiffs have not established entitlement to that injunction against an incomplete process that they also claim is inadequate.

I am happy to focus on any other issues that your Honor would like to discuss in particular.

THE COURT: You have got 19 minutes to go. I realize Ms. Kaplan ended one minute early but that doesn't impose a restriction on you.

MR. ROBERTS: Then one or two points. Probably more than one or two, in all candor.

I want to make clear that the Court can and should consider subsequent administrative events to the February letter. We are here on a second amended complaint that was filed after and explicitly challenges the April letter. The agency's administrative record has not been certified yet, the due date for that is today, and we will be reserving the right to supplement that administrative record because we consider it to still be open as the agency's process is ongoing.

THE COURT: Is there anything in the administrative record, any new information in the administrative record about the impact of congestion pricing or the tolling program on low-income drivers?

MR. ROBERTS: I can't say with certainty at this point, your Honor. It is in the process of being finalized and certified today with the reservation that it can be supplemented because we consider it to still be open.

So, plaintiff's own cases also stand for the proposition that the way in which the agency subsequently treats the challenged action can inform whether that action is considered final for APA purposes. That pragmatic approach to finality is what the Court is supposed to undertake here. It is not a blinkered view where we sort of focus on one point in time and disregard everything that came since it. Perhaps if we were here on the first complaint just challenging the February letter that might be more of an argument that

plaintiffs could make but we are here on the whole range of the agency's conduct here which, undoubtedly, is not consummated. All of the language in the April letter that plaintiffs wish to invoke in order to say that compliance measures are coming is all conditional, it all begins with "if" or "may."

THE COURT: So tell me, what evidence has the agency requested that, in the agency's mind, might change its view about the lawfulness of the VPPP agreement? Have they specified that there is particular evidence that they would like to show that the prior administration in fact did have the authority?

MR. ROBERTS: No, I don't think that we have laid out -- we have explicitly given them an opportunity to contest termination. We have given them explicit opportunity to provide --

THE COURT: What open questions does the agency have with respect to whether the February letter that was sent should be revoked? Does the agency have open questions about whether the letter it sent in February should be rescinded?

MR. ROBERTS: The agency is actively considering that question.

THE COURT: What questions? Tell me what you are seeking them to -- the agency has indicated it is seeking them to answer to say, gee, we are not sure that we actually -- we may have acted improvidently in sending this letter. Is that

the view, that the agency's view is that it acted -- may have acted improvidently in sending the February letter?

MR. ROBERTS: That's not the agency's view. We are open to receiving evidence to that effect and to consider that evidence.

THE COURT: So what evidence, what open questions does the agency have that it wants the plaintiffs to answer?

MR. ROBERTS: It is the same sort of arguments that the plaintiffs are making in the court should be the ones -- are along the lines of what they should be making to the agencies, whether we have authority to terminate, whether we did validly terminate, whether the bases for termination were valid. It is those questions. That's what we mean by giving them an opportunity to contest that termination before FHWA begins imposing compliance measures, again, before we begin imposing compliance measures. That is the opportunity that they came to court asking for and that is the opportunity that they have in the unconsummated agency process that is still ongoing now.

I also want to distinguish *Sackett*. The compliance order at *Sackett* imposed its own independent and immediate consequences for failure to comply. There was a $37,500 daily penalty in *Sackett* that was statutory. There was also an additional $37,500 penalty that was daily for failure to comply with the compliance order that the agency issued in *Sackett*.

So, there is nothing like that here. Again, compliance measures which plaintiffs admit repeatedly are proposed --

THE COURT: Is it your view that the plaintiffs are free to disregard the secretary's February letter and the president's statements? I thought your client had actually taken the position that they were not free to disregard it.

MR. ROBERTS: The position is that they are not free to disregard it. Our position is that there are no immediate consequences until the agency issues a determination --

THE COURT: Your client's position is they're in violation. Is that right?

MR. ROBERTS: That they are in -- without a valid agreement they cannot impose tolls under 301.

THE COURT: And your client's position is that they don't have a valid agreement and that they are currently in violation. Is that right?

MR. ROBERTS: There are two pieces to that, that they don't have a valid agreement -- so --

THE COURT: Is it your client's position that they don't have a valid agreement?

MR. ROBERTS: That's correct.

THE COURT: And is it your client's position that without a valid agreement, they cannot have the tolling program?

MR. ROBERTS: That's correct.

THE COURT: OK.

MR. ROBERTS: Nonetheless, there are no independent consequences, no consequences flow from that determination unless and until the agency first issues a determination of non-compliance and then imposes any compliance measures. And like *Sackett* which doubled the daily penalties, the daily statutory penalties by virtue of the order that was at issue there, there is no such doubling, there is no such increased penalty, there is no such -- you are incurring these penalties now sort of circumstance, in the case here.

I would also distinguish *Sackett* on informal discussions. The order, as plaintiff's characterized it, the order of directive to show cause is not like the open-ended you may come to us if you have informal discussions that you wish to have about this order, which is how I would characterize the *Sackett* order.

THE COURT: Why, if the secretary was uncertain about his legal position didn't he, in February, say this is preliminary and I want to have a discussion. Why is it only in April that he sent the letter? Why, if he was uncertain in February, didn't he indicate his uncertainty and ask for there to be discussion?

MR. ROBERTS: From the agency's perspective, we immediately extended the effective --

THE COURT: No. Answer my question. Why, in February, if he was uncertain, didn't he say, say I'm uncertain about this. My preliminary view is that this authority doesn't exist in FHWA but have a discussion with me.

MR. ROBERTS: Our view is that the immediate extension of the effectiveness of the termination reflected that uncertainty. It was an opportunity for them to come and engage with us. That is how the agency viewed this from the get-go is we extended the deadline, we extended the deadline. We didn't hear anything other than court filings. And so then we come in and say now we must show cause or we might impose compliance measures and that is what they have finally done, they made their submissions on the 21st and the agency is actively considering them so the agency process is not consummated at this point. And again, there are no tangible legal consequences to them like in *Sackett* of doubling daily penalties or anything like that.

THE COURT: Is there anything tentative about the February 20th letter saying: Accordingly, NYSDOT and its project sponsors must cease the collection of tolls? That doesn't sound tentative.

MR. ROBERTS: That is direct language, your Honor, but as I said, the agencies, they're here challenging the full arc of th agency's action here. Your Honor doesn't need to take a blinkered view of just the February letter and determine

whether or not the agency consummated its process there. If we are doing that then we can't be talking about compliance measures because there was no discussion of compliance measures in the February letter so they need both letters in order to be in here, especially seeking preliminary relief in order to talk about compliance measures. That opens up the full arc of the agency's process here for your Honor's consideration.

THE COURT: What do you say about the proposition that the Court is not required to wait for Damocles' sword to fall? At what point would it be ripe for me to issue a preliminary injunction? Do I have to wait for the compliance measures to actually be implemented?

MR. ROBERTS: I don't know. I don't have a -- I think your Honor wants a very tangible number on what now would happen. I don't think that I can offer that to you because it is a pragmatic and practical sort of consideration. Obviously if we were -- and we are not saying this, if we had said compliance measures begin tomorrow, that looks to me like Damocles' sword. We have said if, after we consider, all of the submissions that you made by May 21, we determine that it is appropriate, we may impose some compliance measures from this list and then, again, if you continue to not comply after that, then we may impose other compliance measures. And even after that if you continue to not comply, we may impose other compliance measures. That is not Damocles' sword, that is an

ongoing agency process that hasn't consummated.

I also want to emphasize that ripeness is a separate consideration for final agency action. Often times if final agency action is not found, ripeness is also not found by virtue of that, but ripeness is its own independent question about the fitness of the issues for judicial review and the hardship to the parties which, for the reasons we have laid out in our brief, we don't think either of those has been established here. We do not think that the arbitrary and capricious challenge here is just a purely legal question. As we discussed early on in your Honor's questions this morning, we think there is the question of agency priorities, these policy considerations that plaintiffs again admit informed the February decision but certainly are at the heart of the April decision which also clarify the February decision. That is not fit for review until the agency has had a full opportunity to come to ground on it and consummate the decision-making process that is ongoing at this point.

The hardship to the parties withholding review, again compliance measures are not imposed, they are not imminent. There is nothing that they can point to in the record that says otherwise. In fact, the quotations, again the selective quotations of the April letter to suggest that we will absolutely unquestionably impose compliance measures is not supported whatsoever.

THE COURT: So you do argue that that is a hardship to your client but why isn't it a fair reading of the record for me to conclude that that argument is undermined by your client's actions, to date, and in fact to some extent by the statements that you are making right now. I mean, if in fact your client was suffering a hardship, one would have expected your client to proceed more expeditiously, number one, with respect to compliance measures and, number two, with respect to this litigation. Your client, with respect to this litigation, has not proceeded particularly quickly and now you are telling me, well, what they're doing is unlawful but who knows when we are going to impose compliance measures. That sounds to me like your client really would not suffer very much of a hardship if I were to enjoin your client in the time that is necessary for me to make a decision on summary judgment. Why not let me, give me the time to make a decision on summary judgment, move up your production of the administrative record? You asked for a delay with respect to that. I want to decide this case quickly. So, what is the hardship?

MR. ROBERTS: The hardship is in plaintiff's request to enjoin any further consideration of this question at the agency. An agency is entitled to an opportunity to reconsider, to consider, to fix any of its own mistakes.

THE COURT: I wouldn't preclude you from doing that, I just would preclude you from implementing the compliance

measures that you have now said to me, in effect, there is not any particular urgency for us to do.

MR. ROBERTS: Well, I don't think that I have conceded that there is no urgency to impose compliance measures. I think that I have said that we have not said that there is urgency to impose compliance measures. We are not at a point where the agency has taken that position that compliance measures are necessary at this time. We have taken the opposite position, in fact, that we still need to determinate. And what they're seeking in their own briefs and their own words is to enjoin any further consideration of that question and that is a hardship to the agency, to be unable to continue to carry forward and then consummate the agency process that is under way.

THE COURT: So they say with respect to hardships, they said, listen, they think they're right. Of course they would say that. You say that you are right. But they also say if they're wrong and there are low income drivers or drivers generally who have been told, who should not have been told there exists a ready mechanism for paying back the money, why doesn't that totally undermine any hardship and therefore give me the time to consider the summary judgment papers?

MR. ROBERTS: The question, your Honor is asking about hardship to drivers?

THE COURT: I'm asking about hardship. One of the

things I am required to consider is the balance of hardship, the hardship to plaintiffs, the hardship to your client. Your client has said, listen, this imposes a hardship because there is a toll that's being imposed on people that shouldn't be imposed. They've responded by saying if there is a toll that was imposed improperly, they can repay it.

Why isn't that a complete answer?

MR. ROBERTS: It is not a complete answer because not everyone is entitled. I mean, on its own terms, not everyone is entitled to that relief. It may provide some relief as your Honor is describing it for certain drivers, it doesn't provide relief for all drivers subject to the tolls. And so, to the extent that unlawful tolls --

THE COURT: I thought it did but maybe Ms. Kaplan can correct me. For people with E-ZPass it is quite easy for them do it. For people without E-ZPass it is a little bit of an administrative challenge but it still is possible.

MR. ROBERTS: I'm not sure, your Honor.

THE COURT: OK. You have got a little bit more than two minutes so why don't you sum up.

MR. ROBERTS: I want to sort of conclude by emphasizing actually back to the contractual point here and the separation of powers concerns that it gives rise to.

To the extent they're seeking to enforce an agreement against the federal government, to seek specific performance of

a contract, we have not waived sovereign immunity for that. The implications of that argument for binding through a private agreement between parties without going through Congress, without going through notice and comment rule making, without going through any of the sort of procedures that we have established for establishing binding policy that can last across administrations, the incentives that would be created by allowing for specific performance to be sought and given based solely on a private agreement between parties and the government would wreak havoc and create terrible incentives for future administrations to bind across administrations simply by virtue of a contract.

So, too, would plaintiff's request to enjoin the agency's decision-making process. Agencies are typically, and by virtue of the final agency action requirement for jurisdiction under the APA, allowed to continue and fix their own mistakes, consider their own mistakes to the extent they determine there are such mistakes, and then also the implications of their argument that they could violate the terms of the agreement could violate 301, and there is no authority for us to enforce. I sensed your Honor potentially resisting the need to decide whether we have the authority to impose compliance measures, period. I would urge that restraint, especially since there are no such compliance measures before the Court at this point in time, only

speculative possibility of such compliance measures down the road.

If your Honor has no further questions we will rest on our papers.

THE COURT: Thank you.

The plaintiffs have 16 minutes. Does the Department of Transportation have -- Ms. Kaplan, it is between you and New York State Department of Transportation.

MR. FRANK: No, we have nothing to add, your Honor.

THE COURT: Ms. Kaplan, you have got 16 minutes.

MS. KAPLAN: Thank you, your Honor.

Let me start with the end of the argument of my friend on the other side, your Honor. Your Honor is correct, as we argued in the prior cases the Mulgrew and the other cases, the tolls paid can all be refunded. About 95 percent of the people -- 92 to 95 percent of the people have E-ZPass, that is a very simple transaction but we can refund all of them. We hereby incorporate our arguments in the other cases but you even have it here, your Honor, it is in the affidavit of the TBTA COO at paragraph 39 that we submitted on this motion.

Two. On bonds, your Honor, it turns out that both sets of lawyers sitting at counsel table were correct. Here is the answer: We issued $1.378 billion in bonds already. Those are short-term bonds but the intention is to refinance them with 30 to 40-year long-term bonds. So, again, I give credit

to both sides of the table.

Let me read, in connection with some of the colloquy your Honor just had with the government, let me just read a statement. Last week, May 21, the Daily News published an article about these cases and in that article there is a purported statement from a spokesperson for the DOT and this is what the statement is: "As stated in the April 21 letter, New York Government Hochul has until no later than May 21 to respond to the department." On that, your Honor, we talked about this right to contest issue with the other side, we have put in hundreds of pages for why we think they didn't have the authority to cancel congestion pricing. "Following that deadline, in consideration of the government's response, FHWA may commence compliance actions as soon as May 28."

So I understood that counsel said there would be a gap in time but last week their statement said it is entirely possible there wouldn't be gap in time before compliance measures ensued.

And going back to the bonds question, there is a lot of those questions about the short-term and long-term nature of the bonds is in the affidavit of our CFO issue here, starting at paragraph 12.

Your Honor asked the other side a bunch of questions about what happens when an agency issues a ruling or makes a decision based on something and then talks about something else

later, and I think the *Department of Homeland Security v. Regents* case, which is a recent case out of the Supreme Court, is very, very meaningful on that issue. And what the Supreme Court said there, your Honor, and I am referring to page 21, the Court said, as follows: It is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action. There has been much discussion, we contend, that was on February 19. If those grounds are inadequate, a court may remand for the agency to do one of two things. First, the agency can offer a fuller explanation of the agency's reasoning at the time of the agency action. Again, on February 19 here. This, of course, has limitations. When an agency's initial explanation indicates the determinative reason for the final action taken, the agency may elaborate later on that reason but may not provide new ones. Exactly what is going on here, your Honor. Secondly, the agency can deal with the problem afresh by taking new agency action but I have not understood the DOT or any of the defendants in this case to be saying that is what the April 21 letter was.

There was some statement that, and I am not sure I got it right, that we somehow misquoted the 10-year term in the VPPP agreement. I don't think we misquoted it, your Honor. We fully acknowledge that it says until as long as the contract ends. That was cited in our briefs, as I understand it, for

the reliance in trust of the fact that this is what the parties understood, this is why we are issuing bonds, for reliance and trust that both parties brought into the contract.

On the Tucker Act point, your Honor, Section 4 of the VPPP statute states the following: The secretary shall allow the use of tolls as part of any Value Pricing Pilot Program under this subsection. That's the fundamental dispute in this case, your Honor. We believe that the congestion pricing program was authorized and is authorized by the VPPP statute. That is why the FHWA signed the VPPP agreement and the fundamental dispute here is about an issue of law of what the statute permits, whether that provides limitations on the general prohibition of tolling and 301, which we think it does, and it is not a question of contract interpretation.

I would also refer your Honor to footnote 7 of our reply brief which talks, again cites *Megapulse* for the point that the mere fact that an injunction required the same governmental restraint that specific performance or non-performance might require in a contract setting is an insufficient basis to deny district court jurisdiction.

On terms of the discussion of the regulations and the incorporation of a termination right for the government, your Honor, I again want to state how radical a position we are hearing from the government today because the arguments they make wouldn't just be limited to the VPPP or Section 301. The

arguments they are making about incorporating regulations that talk about all federal laws would give the government the unilateral right to terminate in almost any contract it enters into. And the problem, one of the many problems they have with that is it writes out of the regulations Section 200.340(b) which states that an agency must "clearly and unambiguously specify all termination provisions in the terms and conditions of the federal award." I just don't understand how you can square that language with the argument you heard from my friend on the other side.

Finally, your Honor, and this is really kind of an element of the same argument, is that to allow the government to do what it wants to do here, to basically change its mind in a way about the VPPP agreement or the VPPP statute is really we would argue, your Honor, kind of recipe for chaos in terms of administrative law and how the federal government functions and how it functions vis-a-vis the states, and how it functions in terms of these long-term projects where parties invest a lot of money and people have expectations and reliance interests. And again, there is discussion of this in *Loper Bright*. In *Loper Bright*, I will quote it, Chief Justice Roberts says as follows. He is talking about *Chevron* but the same arguments could be made on what they're saying here. To allow such an argument becomes a license authorizing an agency to change positions as much as it likes, with unexplained inconsistency, being at most

a reason for holding an interpretation to be arbitrary and capricious. Then he talked about *Chevron*. He said: That would foster unwarranted instability in the law, leaving those attempting to plan around agency action in an internal fog of uncertainty.

We would respectfully submit, your Honor, that their argument here would lead to an internal fog of uncertainty, that we did what we were supposed to do, that this contract is a valid contract, that congestion pricing is valid under the laws of this country, and we would be willing and open, your Honor, to take any, discuss any options that will allow these important policy issues to be cited in the proper manner by the court and for the other side not to take action in the meantime so that your Honor can do that.

I don't have anything else, your Honor.

THE COURT: Thank you.

I am going to take a 10-minute recess and then I will be back out on the bench.

(Recess)

THE COURT: I have been assisted by very good briefing by the parties and very able argument. I am going to issue a temporary restraining order under terms that I will say in a moment so that I can consider, more fully, the arguments that have been presented to me orally.

On a preliminary basis, I find that the plaintiffs

have demonstrated a likelihood of success on their claims that the secretary did not, among other things, that the secretary did not have the authority to terminate the VPPP agreement, and even if he had the authority, the reasons for terminating rested on errors of law and was arbitrary and capricious.

I also find that the plaintiffs would suffer irreparable harm in the absence of a restraining order in the time from now until when I have the opportunity to more fully consider the arguments and determine whether to issue a preliminary injunction. The irreparable harm comes in several forms. It comes in the form of undermining the authority of a sovereign state to implement a policy of its democratically elected representatives. There is current harm to the bond market. The harm also can be measured in terms of the delay and possible cancellation of public works projects in the city and potentially in the state, if the measures identified in the April 21 letter are taken.

If, on the other hand, the plaintiffs were to accede to the threat that is contained in the February 19 letter and the April 21 letter and the letters from the FHWA, there would be irreparable harm in the form of the delay and possible cancellation of numerous public works projects, among other things, intended to make transit more efficient and more widely available.

In terms of the balance of hardships, the balance of

hardships weigh decidedly in favor of the plaintiff. In the absence of a restraining order, the plaintiffs will suffer a budgetary uncertainty. In the absence of a restraining order, the plaintiffs will not be able to implement the numerous projects or will be delayed in implementing the numerous projects they have for mass transportation. On the other hand, any harm to the defendants by implementing a restraining order is, for the most part, readily addressed as the plaintiffs have identified and confirmed. If it turns out that tolls were wrongly imposed, that can be remedied by a refund of the tolls that were wrongfully imposed.

So, I am issuing a restraining order which will run from now until June 9 at 5:00 p.m. The restraining order restrains the defendants and the persons identified under Rule 65(d)(2), meaning the defendant's officers, agents, servants, employees and attorneys, and all other persons in active concert or participation with them, from taking any agency action founded on the February 19, 2025 letter from Secretary Duffy to Governor Hochul purporting to terminate the VPPP agreement and rescind federal approval for New York's Central Business District Tolling Program including any action to enforce compliance with or implement the February 19 letter, defendant's purported termination of the VPPP agreement, or defendant's purported termination of the tolling program. They are also restrained from taking any of the actions set forth in

the April 21, 2025 letter. For avoidance of doubt, defendants are enjoined from withholding federal funds, approvals, or authorizations from New York State or local agencies to enforce compliance with or implement the February 19 letter, defendants' purported termination of the VPPP agreement, or defendants' purported termination of the total program.

That is the order of the Court.

I assume that, Mr. Roberts, you will convey that to your client?

MR. ROBERTS: Yes, your Honor.

THE COURT: I also assume that your client will comply with it, as you have indicated; is that correct?

MR. ROBERTS: Yes, your Honor, as I indicated.

THE COURT: I would like to ask the plaintiff's counsel if you wouldn't mind ordering a copy of the transcript.

MS. KAPLAN: Absolutely, your Honor.

THE COURT: If there are any things in the TRO that I have issued require any further clarification, you all have leave to submit letters to me requesting that clarification. I would just ask that you attempt to meet and confer before you send me the letters.

MS. KAPLAN: Thank you, your Honor.

THE COURT: My understanding is that the administrative record is going to be produced today. I am asking the parties to meet and confer with respect to the next

steps in this litigation as I think I flagged through my questions, there is a public interest in moving the case along and if there are steps that can be taken to do that including having the summary judgment papers go in more quickly, or limiting the amount of discovery that may be necessary with respect to the administrative record, I would ask that you take that. You should have a sense from the way I have conducted business so far that the Court is available to all of you as well as to all of the parties who come in front of me, I try to turn to matters quickly.

Is there anything else, Ms. Kaplan, from your end?

MS. KAPLAN: Nothing from plaintiffs, your Honor.

THE COURT: Mr. Robert, from your end?

MR. ROBERTS: Nothing from defense, your Honor.

THE COURT: Thank you all for very helpful argument. Have a good day, everybody.

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